

148 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, John R. Norris,
Tony Clark, and Norman C. Bay.

Gaelectric, LLC
Jawbone Wind Farm, LLC

Docket No. EL14-41-000

v.

NorthWestern Corporation

ORDER DENYING COMPLAINT AND REQUEST FOR WAIVER

(Issued August 6, 2014)

1. In this order, we deny a complaint filed by Gaelectric, LLC and Jawbone Wind Farm, LLC (Jawbone) (jointly, Gaelectric) against NorthWestern Corporation (NorthWestern). We also deny Gaelectric's limited request for waiver of section 17.7 of NorthWestern's Open Access Transmission Tariff (NorthWestern OATT).

I. Background

2. Gaelectric USA Ltd., through its subsidiaries, including Gaelectric, LLC and Jawbone, develops renewable power generation and energy storage projects throughout the United States, with teams specializing in all aspects of project planning, wind resource measurement, transmission planning, permitting, finance, engineering, power marketing, and management. Jawbone is a special purpose entity created to develop a 460 MW wind-powered generating project (Jawbone Project) in Wheatland County, Montana.

3. Northwestern owns and operates electric and gas transmission and distribution facilities primarily located in Montana and South Dakota. NorthWestern provides transmission service over its Montana transmission facilities under the NorthWestern OATT.

4. Gaelectric is planning to develop the Jawbone Project, with the goal of moving the electric output of the project to the point of interface between the NorthWestern and Bonneville Power Administration (BPA) transmission systems. Gaelectric states that, in March 2010, it submitted 14 transmission service requests to NorthWestern for 460 MW of transmission service, with commencement of service dates split between October 2014 and October 2015.¹ Gaelectric notes that it subsequently withdrew some of its requests, but that requests for 480 MW of transmission service remain in the BPA process queue and were originally expected to commence service in late 2015.²

5. Gaelectric explains that, upon submitting the 14 transmission service requests for 460 MW to NorthWestern, Gaelectric notified NorthWestern that the requests were for one wind project, the Jawbone Project, and asked that the requests be studied in a cluster.³ Gaelectric states that NorthWestern ultimately separated its 460 MW of transmission service requests into three separate transmission service offers, with each offer of transmission service different from the others with respect to material terms such as rate calculation and commencement of service. NorthWestern made the first offer of transmission service in three transmission service agreements (TSA) tendered to Gaelectric in September 2012, which together provided for 130 MW of firm service, the amount that could be offered without the need for transmission upgrades.⁴ Gaelectric asserts that, if it had not accepted the 130 MW TSA offered by NorthWestern, this capacity would have been offered to lower-queued transmission service requests. Gaelectric notes that the next requests in the queue were also Gaelectric transmission service requests. Thus, Gaelectric states that, if it did not accept the 130 MW TSA, then it would have been deemed to have withdrawn all of its transmission service requests for the Jawbone Project.⁵

¹ Complaint at 5.

² *Id.*

³ *Id.* at 6.

⁴ *Id.*

⁵ *Id.*

6. Gaelectric asserts that, to avoid abandoning the Jawbone Project and all of its transmission service requests, and to support its ongoing efforts to market the output of Jawbone to potential power purchasers, Gaelectric signed the 130 MW TSA on October 12, 2012, as amended February 20, 2013.⁶ Gaelectric states that, at the end of January 2014, NorthWestern advised Gaelectric that NorthWestern had completed the facilities study process for the remaining transmission service requests. Gaelectric explains that NorthWestern first offered a TSA for 197 MW because NorthWestern had determined that it could construct a new 230 kV line for approximately \$52 million, which would yield 197 MW of additional capacity for Gaelectric. The 197 MW TSA was contingent upon a resolution of a dispute between NorthWestern and BPA over the amount of transmission capacity that NorthWestern has available over NorthWestern's underlying transmission system (230 kV and lower) to provide Gaelectric transmission service to the BPA interface. Additionally, Gaelectric states that NorthWestern determined that a separate transmission project, the Colstrip Upgrade, could be built for approximately \$73 million, yielding an estimated 520 MW of new transmission capacity. Gaelectric notes that it only needed 133 MW to satisfy its remaining Jawbone Project requests, and that NorthWestern offered Gaelectric the remaining capacity in a 133 MW TSA at an incremental cost rate.⁷

II. Complaint

7. On April 21, 2014, Gaelectric filed the instant complaint pursuant to sections 206 and 306 of the Federal Power Act⁸ and Rules 206 and 212 of the Commission's Rules of Practice and Procedure.⁹ Gaelectric requests revisions to the 130 MW TSA entered into

⁶ *Id.* at 7. The 130 MW TSA is a conforming service agreement under the NorthWestern OATT.

⁷ *Id.* at 8. The 197 MW TSA and the 133 MW TSA were filed unexecuted by Northwestern in Docket No. ER14-1616-000. The Commission accepted those agreements for filing on May 30, 2014. *NorthWestern Corp.*, 147 FERC ¶ 61,171 (2014) (May 30 TSA Order). We note that, on July 23, 2014, NorthWestern filed to cancel the 197 MW and 133 MW TSAs. *See* NorthWestern Notice of Cancellation, Docket No. ER14-2482-000.

⁸ 16 U.S.C §§ 824e, 825e (2012).

⁹ 18 C.F.R. §§ 385.206, 385.212 (2013).

between Gaelectric and NorthWestern more than one year ago and asserts that this is necessary to remedy a violation by NorthWestern of its OATT.¹⁰

8. Gaelectric asserts that it is unjust and unreasonable to bind Gaelectric to the TSA for only 130 MW of its requested 460 MW of transmission service, which requires Gaelectric to commence taking this partial amount of transmission service on October 1, 2014, or pay a fee to defer service.¹¹ Gaelectric therefore requests that the Commission modify the executed 130 MW TSA to provide for a commencement date on the later of the date when NorthWestern's dispute with BPA is favorably resolved, or when corresponding transmission capacity on BPA's system becomes available to Gaelectric. Gaelectric states that, in the alternative, if the Commission chooses not to exercise its authority under section 206, then Gaelectric requests a limited waiver of a provision in section 17.7 of the NorthWestern OATT.¹² Specifically, Gaelectric requests waiver of the second sentence in section 17.7 which requires payment of a non-refundable annual reservation fee in order to extend the commencement of service for the 130 MW TSA which becomes effective on October 1, 2014.¹³

9. Gaelectric argues that the 130 MW TSA is unjust and unreasonable because it: (1) does not satisfy NorthWestern's obligation under its OATT to provide Gaelectric with long-term, firm point-to-point transmission service for the full 460 MW as requested by Gaelectric; and (2) imposes, instead, an immediate, long-term obligation on Gaelectric to take less service than is needed, without any assurance that the remaining transmission service requested will be available in the near term, at a reasonable price.¹⁴ Gaelectric asserts that the NorthWestern OATT obligates NorthWestern to "offer" available

¹⁰ Complaint at 2.

¹¹ *Id.* at 9-10.

¹² *Id.* at 10.

¹³ The applicable sentence of section 17.7 of the NorthWestern OATT provides:

The Transmission Customer may postpone service by paying a non-refundable annual reservation fee equal to one month's charge for Firm Point-To-Point Transmission Service for each year or fraction thereof within 15 days of notifying the Transmission Provider it intends to extend the commencement of service.

¹⁴ Complaint at 10.

capacity to a transmission customer that is waiting for its full capacity request to be studied and/or upgrades to be built, but the OATT does not empower NorthWestern to turn the “offer” into a “take-it-or-leave-the-queue” requirement.¹⁵ Gaelectric notes that NorthWestern has cited section 19.7 of the NorthWestern OATT, entitled Partial Interim Service,¹⁶ for its obligation to *require* Gaelectric to commit to take long-term, firm transmission service for less capacity than Gaelectric requested. However, Gaelectric asserts that, in contrast to NorthWestern’s position, the purpose of section 19.7 is to help a transmission customer waiting for upgrades, not to require a transmission customer to make a long-term commitment for a partial amount of service during the time that the customer cannot use that service.¹⁷

10. Gaelectric states that section 19.7 of the OATT also makes clear that partial interim service, if desired by the transmission customer, is to be for an “interim period.” Gaelectric states further that the Commission has clarified that a transmission provider that offers partial interim service must offer “an amendment to the service agreement” to provide the full requested service amount when it becomes available, and that the transmission customer must maintain its current position in the transmission queue pending the offer of a full service agreement.¹⁸ Gaelectric also cites to a 2006 Notice of Proposed Rulemaking (2006 NOPR) on revisions to the *pro forma* OATT in which the

¹⁵ *Id.* at 11.

¹⁶ Section 19.7 of the NorthWestern OATT provides:

If the Transmission Provider determines that it will not have adequate transfer capability to satisfy the full amount of a Completed Application for Firm Point-To-Point Transmission Service, the Transmission Provider nonetheless shall be obligated to offer and provide the portion of the requested Firm Point-To-Point Transmission Service that can be accommodated without addition of any facilities and through redispatch. However, the Transmission Provider shall not be obligated to provide the incremental amount of requested Firm Point-To-Point Transmission Service that requires the addition of facilities or upgrades to the Transmission System until such facilities or upgrades have been placed in service.

¹⁷ Complaint at 11.

¹⁸ *Id.* at 12 (citing *Bonneville Power Administration*, 110 FERC ¶ 61,001, at PP 36-37, *reh’g denied*, 110 FERC ¶ 61,094 (2005) (*Bonneville*)).

Commission explained that “partial interim service has a partial duration element.”¹⁹ Gaelectric states that NorthWestern was required under its OATT to offer long-term, firm point-to-point transmission service for the full amount requested by Gaelectric, and that NorthWestern should not be permitted to make this offer in a piecemeal fashion through multiple partial offers of firm transmission service, under separate agreements, with varying terms and rates applicable to each, offered to the transmission customer over a period of more than a year.²⁰

11. Gaelectric also states that section 4 of the 130 MW TSA should be modified to allow for a commencement date specified in a service agreement for point-to-point transmission service between BPA and Gaelectric, which provides for an equivalent 130 MW of long-term firm point-to-point transmission on BPA’s transmission system between BPAT.NWMT/GARRISON and NorthWestern upon completion of the Central Ferry to Lower Monumental Transmission Project and a remedial action scheme required for the Montana to Washington transmission upgrade.²¹

12. Gaelectric states that, in the alternative, the Commission could grant a waiver of the applicability of the second sentence of section 17.7 of the NorthWestern OATT, which places a payment obligation on transmission customers that postpone the commencement date of a TSA, as it would pertain to the 130 MW TSA between Gaelectric and NorthWestern. Gaelectric states that good cause exists to grant the waiver given that the 130 MW TSA was tendered to it in a manner that is contrary to the applicable NorthWestern OATT provisions and that Gaelectric’s ability to commence service depends on circumstances between NorthWestern and BPA that are outside of Gaelectric’s control.²²

13. Gaelectric asserts that the requested waiver also meets the Commission’s requirements that a requested waiver be of limited scope, address a concrete problem that needs to be remedied, and not have undesirable consequences, such as harming third parties.²³ First, Gaelectric maintains that the scope of the proposed waiver is limited to

¹⁹ *Id.* (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Notice of Proposed Rulemaking, 115 FERC ¶ 61,211, at P 320 (2006)).

²⁰ *Id.* at 13-14.

²¹ *Id.* at Attachment C (containing Gaelectric’s proposed revisions to the executed 130 MW TSA).

²² *Id.* at 18.

²³ *Id.* at 17 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,132, at

three specific TSAs that were entered into in violation of the NorthWestern OATT under circumstances that are unlikely to reoccur. Gaelectric also notes that the proposed waiver is limited in duration in that it will only last until the 460 MW of transmission service is available across NorthWestern's and BPA's transmission systems.²⁴ Gaelectric also provides expert testimony asserting that BPA has acknowledged that it will be able to provide Gaelectric with 105 MW of transmission capacity by the end of 2015 as a result of its construction of the Central Ferry to Lower Monumental Transmission Project and upgrades to a remedial action scheme that governs contingency operations on BPA facilities that may be affected by generation from the Jawbone Project. Gaelectric also claims that BPA expects a senior-queued customer to exit the BPA transmission queue by the end of 2015, which will free up an additional 50 MW of capacity.²⁵ Second, Gaelectric asserts that the requested waiver addresses the concrete issue of Gaelectric's obligation to pay for transmission service that it cannot use. Third, Gaelectric argues that the requested waiver will not harm third parties or NorthWestern, and in fact, will provide benefits to the public by facilitating the development of Montana wind power.²⁶

14. Finally, Gaelectric seeks to consolidate this proceeding with Docket No. ER14-1616-000 involving the unexecuted 197 MW and 133 MW TSAs.²⁷

III. Notice of the Complaint and Responsive Pleadings

15. Notice of the complaint was published in the Federal Register, 79 *Fed. Reg.* 23,970 (2014), with interventions and protests due on or before May 12, 2014. On May 6, 2014, NorthWestern filed its answer to the complaint. On May 9, 2014, BPA filed a motion to intervene and comments, and on May 12, 2014, Powerex filed a motion to intervene. On May 22, 2014, Gaelectric filed a motion for leave to answer and answer. On May 28, 2014, NorthWestern filed a response to Gaelectric's answer.

16. NorthWestern argues in its answer that there is no support for the suggestion that Gaelectric executed the 130 MW TSA against its will or that it opposed executing service

P 8 and n.18 and *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 38 (2014)).

²⁴ *Id.* at 18.

²⁵ *Id.* at Shawley Decl. ¶¶ 36-37.

²⁶ *Id.* at 20.

²⁷ *Id.* at 21-22.

agreements for less than the full 460 MW.²⁸ NorthWestern asserts that, in fact, correspondence with Gaelectric indicates that Gaelectric was eager to execute the service agreements in order to assist in obtaining partners and customers for its proposed project.²⁹

17. NorthWestern also states that both its OATT and Commission precedent make clear that NorthWestern was obligated to offer 130 MW of available firm transmission capacity to Gaelectric and that Gaelectric was required to either accept that available capacity or exit the queue and allow other customers to claim it.³⁰ NorthWestern points out that Gaelectric did not make a single request for 460 MW of transmission service, but rather made 14 separate requests, the first three of which were for 50 MW each. NorthWestern states that its September 14, 2012 system impact study showed that NorthWestern could fulfill the first two 50 MW requests in full.³¹ Therefore, under section 19.3 of the NorthWestern OATT, NorthWestern is obligated to offer that service to Gaelectric, and Gaelectric was obligated either to accept the service or withdraw its respective requests from the transmission queue.³² Moreover, NorthWestern states that, even if Gaelectric had made a single request for 460 MW of transmission service, section 19.7 of the NorthWestern OATT and Commission precedent interpreting that provision would have obligated NorthWestern to offer the 130 MW of capacity to Gaelectric and obligated Gaelectric to either accept the offer of partial capacity or withdraw such requests from the transmission queue.³³ Specifically, NorthWestern cites *Bonneville* for

²⁸ NorthWestern May 6, 2014 Answer at 9.

²⁹ *Id.*

³⁰ *Id.* at 10.

³¹ NorthWestern also states that it revised Gaelectric's system impact study three times to respond to comments from Gaelectric and to reflect changes on NorthWestern's system, including the withdrawal of higher-queued customers. *Id.* at 5.

³² Section 19.3 of the NorthWestern OATT provides that, within 15 days of the system impact study, the customer must execute a service agreement or request the filing of an unexecuted service agreement pursuant to section 15.3, or the application shall be deemed terminated and withdrawn.

³³ NorthWestern May 6, 2014 Answer at 10-11.

the proposition that, if a customer rejects an offer of partial service under section 19.7, the transmission customer will lose its place in the queue.³⁴

18. NorthWestern notes that Gaelectric seeks to revise section 4.0 of the 130 MW TSA so that service will not commence until a corresponding 130 MW of transmission capacity becomes available on BPA's system through the construction of upgrades. NorthWestern states that the Commission should not grant this request, as the NorthWestern OATT, Commission precedent, and sound policy all require NorthWestern to study and provide transmission service on its own system and do not allow NorthWestern to tie up available transmission capacity or deny transmission service to other customers while Gaelectric secures transmission capacity on a third-party system that requires upgrades.³⁵

19. NorthWestern also states that Gaelectric's request for waiver of its obligation to pay a non-refundable fee under section 17.7 of the NorthWestern OATT should be denied, as Gaelectric requested an October 1, 2014 commencement date in its transmission service requests and voluntarily executed the 130 MW TSA reflecting this date.³⁶ NorthWestern points out that the NorthWestern OATT anticipates that customers might not be able to take transmission service on the requested date and contains provisions to protect customers against that risk.³⁷ Specifically, section 23 of the NorthWestern OATT allows a transmission customer to resell or assign all or a portion of the transmission service it has reserved. In addition, NorthWestern notes that section 17.7 allows a customer to obtain up to five one-year extensions of the service commencement date, without surrendering its queue position, by paying a non-refundable fee equal to one month's charge for each year of the extension. NorthWestern states that Gaelectric's requested waiver amounts to a free five-year option on available transmission capacity, and such request should not be granted.³⁸

³⁴ *Id.* at 11 (citing *Bonneville*, 110 FERC ¶ 61,094 at P 30).

³⁵ *Id.* at 13.

³⁶ *Id.* at 14.

³⁷ *Id.*

³⁸ *Id.* at 15.

20. NorthWestern also argues that Gaelectric has not provided good cause to grant the requested waiver of section 17.7.³⁹ First, NorthWestern states that Gaelectric's contention that the 130 MW TSA was tendered in violation of the NorthWestern OATT is incorrect because NorthWestern complied with the requirements of its OATT when it made its offer of transmission service to Gaelectric. Second, NorthWestern states that Gaelectric's claim that its ability to commence service under the 130 MW TSA is contingent on circumstances between NorthWestern and BPA that are beyond Gaelectric's control also is not accurate because the 130 MW of transmission capacity available October 1, 2014 is not contingent on the construction of upgrades, nor affected by the disputed transmission capacity between NorthWestern and BPA.⁴⁰ Finally, NorthWestern argues that Gaelectric's waiver request is not of limited scope because the request seeks an extension until 460 MW of transmission capacity is available across both the NorthWestern and BPA systems, which is an uncertain and indefinite time period.⁴¹

21. In its comments, BPA disputes an affidavit submitted by Gaelectric's witness, who asserts that a senior-queued customer is expected to withdraw from the BPA transmission queue by the end of 2015 because the customer will be unable to meet BPA's remedial action scheme requirements.⁴² BPA states that, while this issue is not the focus of the instant proceeding, it would like to clarify that it is in the process of working on the requirements for the senior-queued customer and that it currently has no basis to expect the customer to withdraw its request by the end of 2015.

22. In its answer, Gaelectric claims that NorthWestern's actions with respect to the 130 MW TSA did not comply with the NorthWestern OATT. Specifically, NorthWestern argues that the plain language of section 19.7 of the OATT, Partial Interim Service, requires NorthWestern to "offer" partial service, but it does not require the transmission customer to accept the offer. Gaelectric states that the provision also includes no reference to the transmission customer being deemed to have withdrawn its request if it does not accept the offer of transmission service.⁴³ Gaelectric reiterates that, in the 2006 NOPR on the *pro forma* OATT, the Commission noted that "partial interim

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 16.

⁴² BPA Comments at 4. *See also supra* n. 25.

⁴³ Gaelectric Answer at 3.

service *has a partial duration element*”⁴⁴ and that a transmission provider who offers to provide partial interim service pending completion of additional upgrades must “amend the agreement after upgrades are completed to provide for the full amount.”⁴⁵ Gaelectric states that the long-term separation of the service offers is important in Gaelectric’s case, because the three offers of transmission service contain significantly different terms of service and rate calculations. Gaelectric also distinguishes precedent cited by NorthWestern, claiming that *Bonneville* involved a situation where the transmission provider could fulfill the transmission customer’s *entire amount* of requested transmission, but only for a partial period unless the customer undertook mitigation steps.⁴⁶

23. Gaelectric states that its alternative requests for relief are reasonable and would add no uncertainty into NorthWestern’s transmission queue.⁴⁷ Gaelectric asserts that it has now been more than four years since Gaelectric submitted transmission service requests for its Jawbone Project, and, after years of study and delay, NorthWestern still is not in a position to offer long-term point-to-point transmission service in the amount Gaelectric requested.⁴⁸ Gaelectric also asserts that NorthWestern’s indefinite suspension of study procedures in Summer 2013 for several projects in the queue, including Jawbone, shows that the uncertainties in NorthWestern’s transmission queue have nothing to do with Gaelectric and are the result of NorthWestern’s inability to resolve multiple outstanding items that will affect future transmission capacity on major facilities.⁴⁹

24. Gaelectric also notes that, for a project developer, firm transmission entitlements are a critical component of success. Gaelectric states that, without signed agreements for firm transmission service over defined paths, lenders are hesitant to finance project development activities, and offtakers will not sign long-term power purchase agreements.

⁴⁴ *Id.* at 4 (citing 2006 NOPR, 115 FERC ¶ 61,211 at P 320 and n.299 (emphasis added)).

⁴⁵ *Id.* at 5 (citing 2006 NOPR, 115 FERC ¶ 61,211 at P 320 and n.303).

⁴⁶ *Id.* (citing *Bonneville*, 110 FERC ¶ 61,094 at P 31).

⁴⁷ *Id.* at 6.

⁴⁸ *Id.* at 7.

⁴⁹ *Id.* at 9.

Gaelectric states that, while receiving the long-term service offer of 130 MW was a major milestone, it does not excuse NorthWestern from complying with its OATT.⁵⁰

25. In response, NorthWestern states that the complaint should be denied because Gaelectric has not shown that the 130 MW TSA resulted from a violation of the NorthWestern OATT. First, NorthWestern reiterates that the Commission has held that, if a customer rejects an offer of partial service under section 19.7 of the *pro forma* OATT, the transmission customer will lose its place in the queue. NorthWestern argues that the Commission found this to be necessary to prevent a customer's request from tying up the firm use of available transfer capability for an indefinite period of time.⁵¹ Second, NorthWestern reiterates that Gaelectric did not make a single request for 460 MW, but instead made 14 separate requests, ranging between 15 and 50 MW. NorthWestern states that Gaelectric was obligated to accept at least 100 MW of the first two transmission service requests, the amount provided without contingencies or the constructions of upgrades, or withdraw its request from the queue.⁵² Finally, NorthWestern points out that Gaelectric has failed to rebut evidence that Gaelectric signed the 130 MW TSA voluntarily.⁵³

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers filed by Gaelectric and NorthWestern because they have provided information that has assisted us in our decision-making process.

27. Gaelectric moves to consolidate this proceeding with the proceeding in Docket No. ER14-1616-000 in which NorthWestern submitted the 133 MW TSA and the 197

⁵⁰ *Id.* at 11-12.

⁵¹ NorthWestern May 28, 2014 Answer at 2 (citing *Bonneville*, 110 FERC ¶ 61,094 at P 30).

⁵² *Id.* at 3 (citing section 19.3 of the NorthWestern OATT).

⁵³ *Id.*

MW TSA unexecuted. Because we have already ruled on the merits in that proceeding,⁵⁴ we will dismiss Gaelectric's motion as moot.

B. Substantive Matters

28. Based on our review of Gaelectric's complaint, we find that NorthWestern's processing of Gaelectric's transmission service requests and the offering of a 130 MW TSA is consistent with the provisions of its OATT and the *pro forma* OATT. Additionally, we find that Gaelectric's request for a limited waiver of the requirement in section 17.7 of the NorthWestern OATT which requires payment of fees to extend the commencement of service does not meet the Commission's standard for granting a waiver. Accordingly, as discussed below, we will deny the complaint and the request for waiver.

1. 130 MW TSA

29. Gaelectric has provided no evidence to support its assertion that NorthWestern forced Gaelectric to accept an unjust and unreasonable 130 MW TSA or withdraw from NorthWestern's transmission queue. To the contrary, as discussed below, we find that NorthWestern followed the provisions of its OATT in processing and offering the 130 MW TSA to Gaelectric. The Commission has held that, once an offer of transmission service is made, consistent with the OATT, the transmission customer must accept the offer or reject it. If the transmission customer rejects the offer, then the customer loses its place in the transmission queue for that request.⁵⁵ Additionally, if Gaelectric felt it was being forced into executing an unjust and unreasonable 130 MW TSA, Gaelectric had the opportunity, pursuant to section 15.3 of the NorthWestern OATT, to request that the 130 MW TSA be filed unexecuted with the Commission without Gaelectric losing its position in NorthWestern's transmission queue; indeed, Gaelectric did not execute the two subsequent TSAs, and NorthWestern filed them unexecuted in Docket No. ER14-1616-000. However, Gaelectric chose not to avail itself of that provision in connection with the 130 MW TSA. Moreover, a review of correspondence between the parties in the record indicates that there is no basis to determine that Gaelectric executed the 130 MW TSA involuntarily.

30. Gaelectric also asserts that, even though NorthWestern treated Gaelectric's 460 MW of interconnection requests as a single project for system impact purposes, NorthWestern separated Gaelectric's transmission service requests into three separate

⁵⁴ May 30 TSA Order, 147 FERC ¶ 61,171.

⁵⁵ See *Bonneville*, 110 FERC ¶ 61,094 at P 30.

transmission service agreements with varying amounts of transmission capacity (130 MW, 197 MW, and 133 MW), and different pricing methodologies, which Gaelectric asserts is in violation of NorthWestern's OATT.⁵⁶ We disagree. The *pro forma* OATT and NorthWestern OATT require the offering of transmission service based on the availability of transmission capacity. Here, we find that the system impact study conducted by NorthWestern indicated that NorthWestern could provide up to 130 MW of firm transmission service without any transmission upgrades or re-dispatch.⁵⁷ Thus, pursuant to section 19.3 of its OATT, NorthWestern is obligated to offer the full amount of Gaelectric's first two transmission service requests (50 MW each). Pursuant to section 19.7 of the OATT, NorthWestern is also obligated to offer 30 MW, the portion of the full amount it was able to provide to Gaelectric without upgrades or re-dispatch, of the third 50 MW transmission service request.⁵⁸ In response to Gaelectric's assertions that partial interim service has a partial duration element, we note that section 19.7 of NorthWestern's OATT does require the transmission provider to offer available transmission service up to the requested amount of service for each individual transmission service request. However, section 19.7 does not require NorthWestern to offer partial transmission service based on the total amount of transmission service requests clustered for purposes of a system impact study. Therefore, we find that NorthWestern's offer of the 130 MW TSA is consistent with its obligation under the *pro forma* OATT and the NorthWestern OATT.

31. In order to avoid taking service or paying fees to delay the October 1, 2014 service commencement date, Gaelectric seeks to revise the 130 MW TSA to provide that the service commencement date shall be the later of the date when NorthWestern's available transmission capacity dispute with BPA is favorably resolved or when corresponding transmission capacity (i.e., 460 MW) on BPA's system becomes available to Gaelectric. Gaelectric notes that this is the same remedy it proposed in Docket No. ER14-1616-000.⁵⁹ However, NorthWestern is not required by the *pro forma* OATT or the NorthWestern OATT to condition a transmission customer's right to transmission service on whether there is transmission capacity on a third party's transmission system.⁶⁰ Thus,

⁵⁶ The unexecuted 197 MW and 133 MW TSAs were accepted in the May 30 TSA Order.

⁵⁷ NorthWestern May 6, 2014 Answer at 5.

⁵⁸ *Bonneville Power Admin.*, 110 FERC ¶ 61,001, at P 37 (2005).

⁵⁹ Complaint at 14.

⁶⁰ See *pro forma* OATT and Northwestern OATT, §§ 1.53, 15.1, 16.2, 21.1;

we will deny Gaelectric's request to modify the service commencement date reflected in the previously executed, conforming 130 MW TSA between the parties.

32. As discussed above, we find that the 130 MW TSA is consistent with both the *pro forma* OATT and the NorthWestern OATT, and is just and reasonable. Accordingly, we will deny Gaelectric's complaint pertaining to modification of the 130 MW TSA.

2. Request for Waiver

33. Gaelectric requests a limited waiver of the second sentence of section 17.7 of the NorthWestern OATT. The Commission has historically granted certain waiver requests in cases involving an emergency situation and/or an unintentional error.⁶¹ Waiver, however, is not limited to those circumstances. The Commission has found that good cause exists for a one-time waiver, where: (1) the waiver is of limited scope; (2) the waiver resolves a concrete problem that needs to be remedied; and (3) the waiver has no undesirable consequences, such as harming third parties.⁶² As discussed below, we find that Gaelectric has not demonstrated good cause to grant a limited waiver of the obligation to pay a non-refundable fee to delay commencement of service under section 17.7 of the NorthWestern OATT and will therefore deny the request.

34. Gaelectric's claim that good cause exists to grant a waiver is based primarily on its contention that the 130 MW TSA was tendered in violation of the NorthWestern OATT and the fact that Gaelectric will not be able to take service on October 1, 2014, as designated in the 130 MW TSA, due to the unavailability of transmission over BPA's transmission system. As discussed above, we find that NorthWestern did not tender the 130 MW TSA in violation of its OATT. Accordingly, we do not find that the situation involves an emergency or unintentional error which could justify a waiver.

see also Exelon Generation Co. v. Sw. Power Pool, Inc., 101 FERC ¶ 61,226, at P 16 (2002); *Commonwealth Edison Co.*, 96 FERC ¶ 61,158, at 61,690 (2001).

⁶¹ *See, e.g., ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006) (using reasoning typically applied to waivers to allow limited and temporary change to tariff to correct an error); *Great Lakes Transmission L.P.*, 102 FERC ¶ 61,331, at P 16 (2003) (granting emergency waiver involving *force majeure* event granted for good cause shown).

⁶² *See, e.g., New York Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086 (2009); *EnerNOC Inc.*, 122 FERC ¶ 61,297 (2008); *Acushnet Co.*, 122 FERC ¶ 61,045 (2008); *Central Vermont Public Serv. Corp.*, 121 FERC ¶ 61,225 (2007); *Waterbury Generation, LLC*, 120 FERC ¶ 61,007 (2007) (each evaluating requests for waiver).

35. Regarding the other circumstances under which the Commission has found good cause for a one-time waiver, first, we find that Gaelectric's request for waiver is not limited in scope. Gaelectric seeks to waive the annual reservation fee to extend the commencement of service until such time as Gaelectric obtains corresponding transmission capacity on BPA's transmission system. We find it inappropriate to waive this provision which requires Gaelectric to pay to defer service under the 130 MW TSA because to do so would deny NorthWestern compensation for deferred service. Moreover, NorthWestern has no control over upgrades and transmission capacity on BPA's system, and thus, the proposed waiver would last for an uncertain period of time based upon actions by a third party. We also note that granting this waiver could have broad applicability, potentially allowing other entities to likewise avoid payment to defer commencement of service in order to remain in the queue.

36. Second, contrary to Gaelectric's contention, the requested waiver does not appropriately address the concrete issue of Gaelectric's obligation to pay for service it cannot use. Rather, the waiver would effectively make the 130 MW TSA contingent on conditions on a third party transmission system, which would be inconsistent with the *pro forma* OATT and NorthWestern's OATT. As discussed above, NorthWestern is not required to condition service on its transmission system on the availability of transmission on a third party's system. Therefore, the waiver will not solve the concrete problem Gaelectric faces with respect to obtaining capacity on BPA's transmission system. We also note that, if Gaelectric is not prepared to take service on the commencement date it originally proposed under the 130 MW TSA, Gaelectric is authorized to sell or transfer some or all of its rights to transmission capacity pursuant to the provisions under section 23 of the NorthWestern OATT.

37. Finally, granting the requested waiver would have undesirable consequences. For example, Gaelectric would tie up available firm transmission capacity for an uncertain period of time without paying the necessary deferral fees, in contravention of the requirements of section 17.7 of the NorthWestern OATT. This would harm NorthWestern and other transmission customers by preventing them from making use of that capacity.

38. Accordingly, we will deny Gaelectric's request for a limited waiver of the second sentence of section 17.7 of the NorthWestern OATT.

The Commission orders:

Gaelectric's complaint and request for waiver are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.